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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ASSINIBOINE AND SIOUX TRIBES, Appellants

v.

R.E. NORDWICK, ET AL., Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

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MEMORANDUM FOR THE UNITED STATES

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EDWIN L. WEISL, JR.,  
Assistant Attorney General.

ROGER P. MARQUIS,  
Attorney, Department of Justice,  
Washington, D. C., 20530.

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FILED

AUG 18 1966

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FOR THE NINTH CIRCUIT

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No. 20440

ASSINIBOINE AND SIOUX TRIBES, Appellants

v.

R. E. NORDWICK, ET AL., Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
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MEMORANDUM FOR THE UNITED STATES

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This memorandum is filed in response to the Court's  
r of July 7, 1966, requesting the views of the United  
es with respect to the proper construction of the Act of  
h 3, 1927, 44 Stat. 1401, as applied to the facts of this

The issue is the rights to oil and gas in the tract  
and granted to Nordwick, appellees' predecessor in title.  
land was formerly part of the Fort Peck Indian Reservation  
ontana beneficially owned by the Assiniboine and Sioux  
es. That grant was made in 1935 under the homestead laws.

The original application to enter under the homestead laws was filed on January 24, 1925. Final proof of compliance was filed in 1929, and final payment was made in 1935 when the final certificate was approved and patent issued.<sup>1/</sup> The Act of March 1927, 44 Stat. 1401, reserved "the oil and gas in the tribal lands undisposed of on the date of approval of this Act" to the Indians having tribal rights on said reservation. Rejecting the claim of the plaintiff tribes, the district court held that this land had been disposed of within the meaning of the 1927 Act at the date it was passed and, hence, the mineral reservation was improper.

It is the view of the United States that this ruling<sup>2/</sup> was erroneous. By memorandum of March 23, 1956, the Assistant Solicitor, Branch of Minerals of the Department of the Interior advised the Bureau of Land Management that this land was "undisposed of" when the Act of March 23, 1927, became law (Plaintiff Exhibit No. 61). Citations were given to the effect that "disposal" means alienation of title. The Department of the Interior

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<sup>1/</sup> The original patent specifically reserved the minerals. However, that reservation was eliminated in a supplemental patent issued May 9, 1956.

<sup>2/</sup> We express a view only as to the issue here presented, i.e., the meaning of the 1927 Act. Of course, other issues as to the rights between the United States and the Indians, for example as to when liability occurs for the purposes of the Indian Claims Commission Act, present different problems and different considerations.

heres to this view (see letter attached as Appendix A), and  
s Department concurs. A recent application of the principle  
t a statute "must be liberally construed in favor of the  
inole Tribe and all doubtful expressions therein resolved  
favor of the Seminole Tribe" is Maryland Cas. Co. v. Citizens  
'1 Bank (C.A. 5, No. 21992, May 13, 1966), printed in Appen-  
B. infra.

No reason appears why Congress should be considered  
have exercised less than all of the authority it possessed  
reserve minerals for the Indian Tribes.

Respectfully submitted,

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

ROGER P. MARQUIS,  
Attorney, Department of Justice,  
Washington, D. C., 20530.

AUGUST 1966





UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

Your reference:

RPM:SBH

90-2-0-609

Hon. Edwin L. Weisl, Jr.  
Assistant Attorney General  
Land & Natural Resources Division  
Department of Justice  
Washington, D. C. 20530

JUL 27 1966

Dear Mr. Weisl:

This replies to your letter of July 12, 1966, concerning Assiniboine and Sioux Tribes, et al. v. R. E. Nordwick, et al., No. 20,440, in the Court of Appeals for the Ninth Circuit, which requested our views on the proper construction of the Act of March 3, 1927, 44 Stat. 1401.

The question before the court is whether surplus Fort Peck tribal land which was the subject of a homestead entry under the Act of May 20, 1908, 35 Stat. 558, which entry was unperfected when the Act of March 3, 1927 became effective, was undisposed of within the meaning of the 1927 Act so that oil and gas underlying it was reserved for the benefit of the Indian tribes. A supplemental patent for the oil and gas underlying appellees' homestead was granted, notwithstanding two opinions of the Solicitor's Office that such patent should not issue. We are of the view that these opinions were correct.

We think that surplus tribal land upon which an unperfected homestead entry had been made were "undisposed of" within the meaning of section 1 of the 1927 Act. The memorandum opinion of the Assistant Solicitor, Branch of Minerals, dated March 23, 1956, a copy of which is enclosed, properly concludes that under the public land laws "disposal" means the alienation of title and that anything less does not amount to "disposal" within the meaning of the 1927 Act as applied to the circumstances of this case.

The published decisions of this Department over the past sixty years have time and again stated the position that lands entered under the homestead laws and similar laws may be withdrawn by the United States for any of several purposes before all requirements leading to the issuance of a patent have been satisfied. Similarly, before an entry has been perfected by performance of the entrymen of all that he is required to do for a patent, the United States may reserve unto itself the mineral rights therein or require a waiver of the same under pain

of cancellation of the entry. See Mary C. Sands, 34 L.D. 653 (1966); Instructions, 43 L.D. 294 (1914); Cleveland Johnson (On Rehearing), 48 L.D. 18 (1921); Columbus C. Mabry (On Rehearing), 48 L.D. 280, (1921); Leo O. LaFlame, 49 L.D. 324 (1922); Arsene J. Martin, 49 I.D. 608 (1923); Jacob Terrell, 49 I.D. 671 (1923).

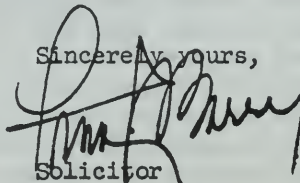
Moreover, it appears that neither party disputes that the United States could have reserved the oil and gas in the subject land. Appellees, however, contend that Congress did not intend to so reserve the minerals and that therefore they are not reserved where entry was made prior to the effective date of the 1927 Act.

The best argument which we find in support of the appellees' position is that based on the effect given by this Department to allotment selections made by Fort Peck Indians before the effective date of the 1927 Act. This Department held that a Fort Peck Indian is entitled to an allotment free of the oil and gas reservation provided by the 1927 Act, even though his selection, made before the effective date of the 1927 Act, had not received departmental approval until after the Act became effective. See Raymond Bear Hill, 52 I.D. 688 (1929). But the difference between an allotment selection and an entry as regards its effecting a disposition of Fort Peck tribal lands is quite clear. The Indian, after making his selection, need do nothing further to perfect his right to an allotment from the common property of his tribe. The homestead entryman, on the other hand, does not become entitled to a grant of the land, as does an Indian who has selected an allotment, until he has submitted final proof.

Therefore, the allotment selection cases merely confirm our view that Congress in passing the 1927 Act intended to secure to the Indians having tribal rights on the Fort Peck Reservation the oil and gas interests in surplus tribal lands in which on the effective date the 1927 Act no rights adverse to the Indians had been perfected. Finally, if there is any doubt as to this being what Congress intended by the use of the words "undisposed of", such doubt, in accordance with the rule of resolving doubtful expressions in Federal legislation in favor of the Indians, must be resolved in favor of the Fort Peck Tribes. Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 354 (1941).

As requested by your letter of July 14, 1966, the copies of the opinion and of appellants' brief and reply brief are enclosed.

Sincerely yours,



Solicitor

Enclosures (4)

March 23, 1956

Memorandum

To: Mr. Lewis Hillman, BLM

From: Assistant Solicitor, Branch of Minerals

Subject: Proposed supplemental patent to Arthur L. Nordwick  
Patent No. 1080633.

I am unable to agree with you that the land in question had been "disposed of" when the act of March 3, 1927 (44 Stat. 1401) was passed or that it was then "disposed of".

The following citations are conclusive of the questions:

The term "disposal" means alienation of title, Arant v. State of Oregon, 2 L. D. 641. The granting of a prospecting permit "not being an act of alienation of property or granting a divestiture of title is not a "disposal" of the land in any proper sense." Sol. Op. September 30, 1921, 48 L. D. 459, 465, citing Arant v. State of Oregon.

"It is that final and irrevocable act by which the rights of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of, \* \* \*." State of Oregon et al v. Frakes, 33 L. D. 101, 103.

The courts hold likewise, United States v. Racker, 3 Fed. 292, 294, Mutual Loan & Thrift Co. v. Corn, 188 S.W. 2d 345, 346; Manion v. Peoples Bank of Johnston, 38 N.Y.S. 2d 484, 490; Scott v. State, 64 S. E. 1005, 1006; In re Olson's Estate, 94 N. W. 421, 422. A voluntary parting with anything short of an estate in the land is not a "disposal" of it. In re Hubbell Truat, 113 N. W. 512, 515.

In this connection it is noted that although Nordwick signed a waiver of the oil and gas as to 80 acres only and not as to the remaining 160 acres the patent reserved the oil and gas in all of the 240 acres. To forestall any possible action to issue a patent for the 160 acres free of any reservation, permit me to point out that the Bureau apparently inadvertently complied with the 1927 act as to that 160 acres, and the patent should stand. There is no requirement in the 1927 act that a grantee consent to the reservation. In fact, the act itself reserves the oil and gas in land undisposed of on the date of the act as all of the 240 acres were.

Presumably the Bureau in calling for consent proceeded unnecessarily in the same manner as it customarily and rightly-proceeded-and proceeds-under the act of July 17, 1914.

The draft decision is returned without endorsement.

Assistant Solicitor  
Branch of Minerals

Attachment

copy to: Mr. Kammerer, Solicitor's Office  
Mr. Larkin, Indian Office  
Secretary's Office  
Docket Section  
Div. of Public Lands Reading Files

CRBradshaw:dvw  
3/23/56

IN THE  
**United States Court of Appeals**  
FOR THE FIFTH CIRCUIT

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No. 21992

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MARYLAND CASUALTY COMPANY,  
Appellant,  
versus

CITIZENS NATIONAL BANK OF WEST HOLLYWOOD,  
ET AL.,  
Appellees.

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*Appeal from the United States District Court for the  
Southern District of Florida.*

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(May 13, 1966.)

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Before PHILLIPS,\* RIVES and COLEMAN, Circuit  
Judges.

PHILLIPS, Circuit Judge: The question here presented is whether the Seminole Tribe of Florida, Inc.,<sup>1</sup> was immune from an ancillary action in garnishment to satisfy a judgment obtained against it. Seldomridge Construction Company,<sup>2</sup> as prime contractor, entered into a written con-

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\* Of the Tenth Circuit, sitting by designation.

<sup>1</sup> Hereinafter called the Seminole Tribe.

<sup>2</sup> Hereinafter called Seldomridge.

tract with the Seminole Tribe to construct for the latter an office building and an arts and crafts center. Pursuant to the terms of the prime contract, Seldomridge, as principal, and Maryland Casualty Company,<sup>3</sup> as surety, entered into a performance and payment bond with the Seminole Tribe, one condition of which was that Seldomridge would pay for all labor and materials incorporated in the buildings.

Article V of the prime contract, which was incorporated in the bond, in part provided that "before issuance of final certificate, the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills \* \* \* have been paid."

Unit Structures, Inc.,<sup>4</sup> furnished materials to Seldomridge, which were incorporated in the buildings, of the reasonable value of \$14,004.15, for which it had not been paid. The President of Seldomridge represented to the Seminole Tribe that Seldomridge had a damage claim against Unit Structures that would more than satisfy the latter's claim for materials. Thereafter, on September 22, 1960, Seldomridge, by a written contract, agreed to indemnify the Seminole Tribe from any liabilities, loss, damage or expense which it might sustain by reason of any claim made by Unit Structures. Thereafter, the Seminole Tribe paid Seldomridge the final payment due on the construction contract.

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<sup>3</sup> Hereinafter called Maryland.

<sup>4</sup> Hereinafter called Unit Structures.

In the original action brought by Unit Structures, it recovered a judgment against Maryland for \$14,004.15, the amount due on its claim for materials, plus interest, attorneys' fees, and costs, aggregating \$19,482.90, and Maryland, as third party plaintiff, recovered a judgment against the Seminole Tribe for \$17,332.90.<sup>5</sup>

Prior to the execution of the construction contract, the Secretary of the Interior had issued to the Seminole Tribe a charter of incorporation under the provisions of 25 U.S. C.A. § 477, and at all times here material it was a body corporate.

Maryland, after recovering judgment against the Seminole Tribe, caused a writ of garnishment to issue and to be served against the Citizens National Bank of West Hollywood,<sup>6</sup> seeking to recover tribal funds on deposit in such bank to satisfy its judgment.

At the time the writ was served, all of the funds deposited in the Bank to the credit of the Seminole Tribe had been deposited by the United States as a part of a revolving credit fund for the Seminole Tribe, under a deposit agreement that provided:

"The Seminole Tribe of Florida, Inc. hereby assigns, transfers and pledges the aforesaid deposit or deposits, hereby or hereafter made, to the 'United States of America' as security for the repayment of any and all indebtedness for which it

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<sup>5</sup> Judgments were also awarded Maryland against Seldomridge and in favor of the Seminole Tribe against Seldomridge.

<sup>6</sup> Hereinafter called the Bank.

may obligate itself to the United States of America and for the performance of the Corporation's obligations in connection with such indebtedness until such time as deposit or deposits are released, as hereafter provided."

It further provided that "upon written demand of the Superintendent of the Seminole Indian Agency the bank" should "pay over the balance" of the deposit, "or any part thereof demanded, in accordance with the demands."

The United States was not a party to the action, but on June 5, 1964, it filed in the action a document entitled, "Representation of Interest of the United States," in behalf of itself and the Seminole Tribe, in which it set up that the Seminole Tribe received a loan of \$100,000 from the United States from the revolving credit fund maintained by the Bureau of Indian Affairs; that the amount of the loan was deposited in the Bank, pursuant to the terms of the deposit agreement, and an assignment of the deposit to the United States as security for the repayment of the loan; that the agreement also provided for withdrawal of the deposit upon the written demand of the Superintendent of the Seminole Indian Agency; that on May 28, 1964, the Superintendent made a written demand on the Bank for the withdrawal of the balance of such deposit; that the Bank refused to deliver to the Superintendent the entire balance and withheld a sum from such balance to cover the amount of Maryland's judgment against the Seminole Tribe.

The United States asserted in the document in behalf of the Seminole Tribe and itself that the funds on deposit were not subject to garnishment. The Seminole Tribe filed a motion to dismiss the garnishment proceeding.

The court held that under Article VI, Sec. 9 of the Charter, set out *infra*, the funds were immune from garnishment and that the United States had a lien on the deposit, which was prior to the judgment of Maryland, and dismissed the ancillary garnishment proceeding with prejudice. Maryland has appealed.

The paramount authority of the federal government over Indian tribes and Indians is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection as wards of the United States.<sup>7</sup>

From the beginning of our government, Indian nations or tribes have been regarded as dependent political communities or nations; and as possessing the attributes of sovereignty, except where they have been taken away by Congressional action.<sup>8</sup> They are quasi-sovereign nations.<sup>9</sup>

<sup>7</sup> Williams v. Lee, 358 U.S. 217, 219, n. 4; Perrin v. United States, 232 U.S. 478, 482; United States v. Kagama, 118 U.S. 375; Taylor v. Tayrien, 10 Cir., 51 F.2d 884, 887; Bryan County Okl. v. United States, 10 Cir., 123 F.2d 782, 785.

<sup>8</sup> Choctaw and Chickasaw Nations v. Seitz, 10 Cir., 193 F.2d 456, 458; Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, 653; Native American Church v. Navajo Tribal Council, 10 Cir., 272 F.2d 131, 133; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 8 Cir., 231 F.2d 89, 92.

<sup>9</sup> United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 513; Ex parte Reynolds, C.C. Ark., Fed. Cas. No. 11,719; Cf. Cherokee Nation v. State of Georgia, 5 Pet. 1, 7.

Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization.<sup>10</sup>

25 U.S.C.A. § 477, in part here pertinent, provides:

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: \* \* \*. Such charter may convey to the incorporated tribe the power to purchase, \* \* \* own, hold, manage, operate, and dispose of property of every description, real and personal, \* \* \* and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, \* \* \*."

The Seminole Tribe was incorporated pursuant to that section. The statute gave no powers to the corporation. It provided that the Secretary of the Interior "may" convey powers to the corporation by the charter; and it is clear that the powers granted to the corporation were only those which the Secretary of the Interior, by the terms of the charter, conveyed to them.

The charter, by Article VI thereof, defined the powers of the corporation. In part here material, it reads:

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<sup>10</sup> United States v. United States Fidelity & Guaranty Co., supra; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., supra, p. 94; Cf. Williams v. Lee, supra; Halle v. Saunooke, 4 Cir., 246 F.2d 293, 297; Colliflower v. Garland, 9 Cir., 342 F.2d 369, 376.

"Section 1. This tribal corporation, subject to any restrictions contained in the Constitution and the laws of the United States or in the Constitution and Bylaws of the said tribe, shall have the following corporate powers.

\* \* \* \* \*

"Sec. 9. To sue or be sued; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida, Inc., other than income or chattels especially pledged or assigned."

The waiver of the immunity to being sued was expressly qualified, and excluded from the waiver was the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida.

Counsel for the appellant urges that garnishment is not specifically named in the exclusionary clause and, therefore, is not excluded. We think there are two answers to that contention.

First, garnishment is closely akin to attachment. It "is directly founded upon the writ of attachment as by custom of London."<sup>11</sup> It is frequently defined as an attachment of goods, credits or effects belonging to the defendant or judg-

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<sup>11</sup> Bouvier's Law Dictionary, Rawle's 3rd Rev., Vol. 1, pp. 1334, 1335.

ment debtor in the hands of a third person.<sup>12</sup> The courts have characterized it as a species of attachment,<sup>13</sup> and in the nature of an attachment<sup>14</sup> or execution.<sup>15</sup>

But even more persuasive is the fact that the qualifying clause was written into Section 9 by the Secretary of the Interior to protect the property of the Seminole Tribe, other than income or chattels especially pledged or assigned; and hence it must be liberally construed in favor of the Seminole Tribe and all doubtful expressions therein resolved in favor of the Seminole Tribe.<sup>16</sup>

The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians

<sup>12</sup> *Kennedy v. Brent*, 6 Cra. 187, 10 U.S. 106; *Beamer v. Winter*, 41 Kan. 596, 21 P. 1078; *Blaisdell v. Ladd*, 14 N.H. 129; *Berry-Beall Dry Goods Co. v. Adams*, 87 Okl. 291, 211 P. 79; *National Bank of Wilmington & Brandywine v. Furtick*, 2 Marv. (Del.) 35, 42 A. 479, 481; *Posselius v. First National Bank*, 264 Mich. 687, 251 N.W. 429, 430; *J. T. Sinclair Co. v. I. T. Becker Coal Co.*, 263 Mich. 617, 249 N.W. 13, 14.

<sup>13</sup> *Ex parte Cincinnati, S.&M. Ry. Co.*, 78 Ala. 258, 259; *Citizens' National Bank of Godley v. Pollard*, Tex.Civ.App., 31 S.W.2d 508, 510; *Farmers' National Bank v. Tehnison*, 90 Okl. 216, 217 P. 182, 183; *Public Finance Co. v. Jump*, 192 Okl. 368, 136 P.2d 706, 710; *Allen v. Stracener*, 214 Ark. 688, 217 S.W.2d 620, 621; *First National Bank of Duncan v. Wallace*, 191 Okl. 105, 127 P.2d 156, 158; *Posselius v. First National Bank*, *supra*; See also, *National Bank of Wilmington & Brandywine v. Furtick*, *supra*.

<sup>14</sup> *Newport v. Semones*, 39 Tenn. App. 647, 286 S.W.2d 876, 880; *J. T. Sinclair Co. v. I. T. Becker Coal Co.*, *supra*; *Coller v. Sheffield Farms Co.*, 129 Misc. 600, 223 N.Y.S. 305, 310; *Davis Brothers v. Choctaw O. & G.R. Co.*, 73 Ark. 120, 83 S.W. 318, 319; *Central Trust Co. v. Chattanooga R.C.R. Co.*, 6 Cir., 68 F. 685, 687; See also, *Dean v. Opdycke*, 151 Wash. 504, 276 P. 545, 546.

<sup>15</sup> *Davis Brothers v. Choctaw O. & G.R. Co.*, *supra*; *Coller v. Sheffield Farms Co.*, *supra*.

<sup>16</sup> *Squire v. Capoeiman*, 351 U.S. 1, 6, 7; *Haley v. Seaton*, C.A.D.C., 281 F.2d 620, 623; *Arenas v. Preston*, 9 Cir., 181 F.2d

need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need. It is obvious that the President of Seldomridge imposed on the Seminole Tribe when he induced it to pay Seldomridge the unpaid balance on the construction contract, with Unit Structures' claim outstanding. To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians. The Supreme Court has not hesitated to hold the immunity applicable in actions for liabilities arising out of private transactions.<sup>17</sup>

We conclude the Seminole Tribe was immune from the garnishment proceeding. It becomes unnecessary to pass on the claim of the United States to a prior lien on the deposit.

AFFIRMED.

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62: *United States v. Oregon Short Line R. Co.*, 9 Cir., 113 F.2d 212, 214; *Big Eagle v. United States*, Ct. Cl., 300 F.2d 765; *United States v. Glibertson*, 7 Cir., 111 F.2d 978, 980.

<sup>17</sup> *United States v. United States Fidelity & Guaranty Co.*, *supra*; *Williams v. Lee*, *supra*.

